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EUGENICS AND THE CRIMINAL LAW.¹

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The science of eugenics is the object of increasing interest among sociologists and jurists. Given a name and, in a sense, founded by Sir Francis Galton, this science, as is well known, aims at bettering, both physically and mentally, the qualities of the race in future generations. It cannot be doubted that the fewer the deleterious elements scattered throughout society, the greater must be the productivity of the social organism in all the fields of human endeavor. A saner and stronger race—that saner and stronger mankind heralded by prophet and philosopher—is what eugenics today holds in view. And it is by reason of the characteristic attention of the English-speaking peoples to everything which concerns physical development and social well-being that this science has taken form in their midst.

Eugenics is a matter that possesses great interest for the criminalist, although so far as I know, no criminalist has yet dealt with it. Criminals are deleterious elements in the race—individuals who lack adaptation from a social standpoint—especially when they come within the categories of *born criminals* and *insane criminals* in Ferri's classification, or within the category of *Zustandsverbrecher* (men of criminal character) pursuant to the teachings of von Liszt.³ If the doctrines of eugenics are to be based solely upon the laws of heredity (Mendel, Galton, et al.), then it is natural to demand that measures be adopted to hinder the reproduction of those offenders who constitute deleterious racial elements, in order that they may not inflict upon society a posterity with criminal tendencies. Measures such as the practice of sterilization already prevailing in a number of the American states would answer this purpose perfectly.

But we are unable to agree that the science of eugenics should rest on this purely biologic basis. Heredity is the subject of much debate, and serious doubts have arisen as to its laws, especially with regard to the transmissibility of intellectual and moral characteristics. Now a science which favors positive methods and *ought* to proceed by the use of these methods cannot build on any such foundation of sand as the laws

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³[Or, one might add, can be numbered among the authors of *natural crimes*, according to Garofalo. See his "Criminology" (Criminal Science Series—Boston, Little, Brown & Co., 1914)—*Transl.*]

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of heredity. There is consequently much to be said against the practice of sterilization. For one thing, there is the doubt as to the transmissibility, by inheritance, of moral and hence of criminal characteristics. Then, again, we have no criterion which will enable us, all at once, to diagnose the case as to its corrigibility or incorrigibility, and there is thus great danger of applying the extreme remedy where the criminality is of a transitory sort. And, finally, the practice is not one that should be tolerated in what we conceive to be the liberal state. Measures of so radical a character, it seems to us, will merely tend to upset the just equilibrium and still further to postpone attainment of the eugenic ideal.

According to our view, eugenics is that science which looks to the amelioration of the physical and mental qualities of the race, by the employment of all those means which *experimental investigation* has demonstrated most fit. And we believe that its task is not a revolutionary one, but rather that of transforming and adapting existing institutions to attain its ends. One of the social institutions which ought to be adapted to these ends is that of *punishment*. Punishment as administered today works altogether too much harm to the physical and mental qualities of the offender—of the individual whose reformation and useful re-adaptation to the normal environment society should have ever in view. The penal establishment is a place of physical and psychic suffering, varying with the organic resistance and moral sensibility of the convict. Moreover, the anti-eugenic harm which it works is not alone to the man who directly undergoes it, but also to his relatives and family. Often these persons suffer more severely than the convict himself. And through economic stress, the want of guidance, the need of affection, they take the path of degradation, without power to resist—driven to theft, adultery, and prostitution, on the one hand—encountering disease and despair on the other.

Now, eugenics requires that punishment, as a harm inflicted for a fixed period, be transformed into a harm which shall vary in duration according to the conduct of the offender. And precisely this sort of harm is found in the indeterminate sentence, which, although the subject of severe criticism, has nevertheless yielded good results in the states of the American Union where it has been adopted. The idea is sound; everything depends upon finding the best means of making it work in practice. Today the judge, in pronouncing sentence, condemns the offender to imprisonment for a fixed number of years. Instead, the quantum of the punishment ought to be adjusted to the individual during the course of experimentation, having always in view his re-adaptation to society. Otherwise, we would be doing much the same as the

physician who, for an ordinary fever, prescribes forty days of quinine, when two would have been sufficient, and thus kills his patient. Punishment so far as is necessary, but no further—this should be the watch-word of penal science.

Under punishment for an indeterminate period, the condition of the offender changes greatly, from a eugenic point of view. He becomes calmer and has a strong stimulus to self-improvement. He knows that the duration of his imprisonment depends upon his conduct. Society does not say to him: "You are guilty, and therefore you are a ruined man; for you there is no further hope." What it says is: "You are guilty, but nevertheless you will be welcomed back to honest life as soon as you have shown yourself worthy." The prison will thus teach not irrevocable debasement, but redemption through personal effort. The indeterminate sentence aims to return to society a man physically and mentally fit instead of one lacking in adaptation.

Furthermore, the indeterminate sentence does not produce upon the convict's family the anti-eugenic effects which characterize the punishments of the present day. Instead of degradation and despair, the indeterminate sentence, through the psychic law that the uncertain has fewer torments than the certain, carries with it hope and tranquillity. The family from time to time is expecting the liberation of the offender; it takes heart at the encouraging news from the prison administration. There is something to cling to; faith in personal effort is not destroyed; the organism is more resistant to disease; the blight of the crime is healed; upon the wife, the daughter of the convict, is more strongly impressed the value of honest living. Thus the indirect and eugenically maleficent effects of punishment are in many cases completely annulled.

During the last quarter of a century, the struggle against crime has more than ever become the center of attention in all the civilized countries. The stimulation of interest in this question, the propagation of its study throughout the world, the bringing of it home to every thinker on social problems—this is wherein consists the unquestioned merit of the Italian positive school. And the movement of reform in penal legislation, which is the prime activity of this school—a movement which, though debated and open to debate, in part, at least, proceeds on sound premises—has been held solidly in line by that distinguished sociologist and humanitarian, Enrico Ferri.

Now, every attack which is directed by the modern state against crime is a step in accord with the eugenic ideal. Crime acts anti-eugenically in two distinct ways: first, the tendency to offend, *le penchant au crime*, can be hereditarily transmitted, and, secondly, with

criminal parentage, there necessarily goes a criminal environment in which that tendency increases by appropriating to itself criminal impulses and habits.

But, besides crime, there is a certain clever and ingenious knavery which, wearing the garb of honesty, often causes, and with impunity, much greater injury to its victim than crime proper. Here, too, there is naturally created a criminal environment most dangerous to the offspring. Like crime proper, this "criminal *hinterland*" is to be combated in the name of eugenics, and along two lines in particular: First, certain acts which today are unpunishable, as, for example, certain species of commercial fraud, should be classed as crimes. These should be the subject of stringent legislative measures and their punishment should, as far as possible, be directed toward bringing about a greater amount of good faith in commercial affairs. Secondly, apart from the punishment, application should be made of all those general measures—economic betterment, moral education, and the like—which aim at restraining individual enterprise and ingenuity within the socially useful confines of honesty.

Concerning the relationship between eugenics and crime, it must therefore be noted that the penal code is *par excellence* a group of eugenic measures. For the code exacts only the conservation of certain interests and sentiments, indispensable to the well-being and development of the race. Hence *the penal code is a eugenic instrument*, although until today, it has been without consciousness of this function. And following the results of eugenic science, it can tomorrow widen or narrow the circle of crimes in the end of conducing to the physical and psychic improvement of the race.